No.

IN THE

Supreme Court of the United States

October Term, 1991

PHILLIP AMATO, RITA AMATO, and JAMES RAFFA,

Petitioners,

against

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, SECOND DEPARTMENT

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Of Counsel

QUESTIONS PRESENTED

1. Whether Petitioners' federally guaranteed rights to due process, confrontation and cross-examination were violated by the procedures adopted by the trial court in conducting a jury and a non-jury trial as a single trial.

2. Whether Petitioners' federally guaranteed rights to have compulsory process for obtaining witnesses in their favor was violated by the court's refusal to enforce a subpoena requiring the Commander of the 109th Police Precinct to appear and testify.

3. Whether Petitioner Phillip Amato's federally guaranteed right to counsel of choice was violated by the court's order disqualifying his privately retained counsel, and counsel's law firm, from representing him at trial.

LIST OF PARTIES

The parties to the proceeding below were Petitioners Phillip Amato, Rita Amato, and James Raffa and the Respondent, State of New York.

TABLE OF CONTENTS

APPENDIX

TABLE OF CONTENTS (Cont'd)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Cont'd)

STATE CASES

TABLE OF AUTHORITIES (Cont'd)

STATE STATUTES

TABLE OF AUTHORITIES (Cont'd)

PAGE

MISCELLANEOUS

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Petitioners Phillip Amato, Rita Amato, and James Raffa respectfully pray that a Writ of Certiorari be issued to review the Decisions and Orders of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, rendered on May 28, 1991, which unanimously

affirmed the judgment of the Supreme Court of the State of New York, Kings County, convicting the Petitioners of Arson in the Third Degree (N.Y. Penal Law §150.10 [McKinney, 1988]) and imposing sentence. Leave to appeal to the New York Court of Appeals was denied upon reconsideration on August 21, 1991 (9A-11A).

OPINIONS BELOW

The Decisions and Orders of the Appellate Division of the Supreme Court of New York, Second Department, are reported at: ____ A.D.2d ___, 570 N.Y.S.2d 817 (A.D. 2d Dept. 1991) (Petitioner Phillip Amato); ____ A.D.2d ___, 570 N.Y.S.2d 819 (A.D. 2d Dept. 1991) (Petitioner James Raffa); ____ A.D.2d ___, 570 N.Y.S.2d 1017 (A.D. 2d Dept. 1991) (Petitioner Rita Amato). The Decisions and Orders are reprinted in the Appendix, pp. 1a-8a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The Appellate Division's Decisions and Orders sought to be reviewed were filed on May 28, 1991. Leave to appeal to the Court of Appeals was timely sought on behalf of Petitioners Phillip Amato, Rita Amato, and James Raffa. On August 21, 1991, Hon. Vito J. Titone, Associate Judge of the Court of Appeals of New York, denied leave to appeal to the Petitioners. This Petition for a Writ of Certiorari is filed within the time prescribed by U.S. Sup.Ct. Rule 13, 28 U.S.C.A.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ***; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Fourteenth Amendment:

"*** nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATUTE INVOLVED

N.Y. Penal Law §150.10 (McKinney's 1988). Arson In The Third Degree.

"1. A person is guilty of arson in the third degree when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion.

DISCIPLINARY RULES OF N.Y. CODE OF PROFESSIONAL RESPONSIBILITY.

DR 5-101. Refusing Employment When The Interests of the Lawyer May Impair His Independent Professional Judgment.

"(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness ***"

DR 5-102. Withdrawal As Counsel When The Lawyer Becomes A Witness.

(A) If after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(b)(1) through (4).

STATEMENT OF THE CASE

On April 20, 1987, at approximately 11:00 P.M., a fire broke out at 171-27 Gladwin Avenue, Queens, New York. An investigation ensued, after which Petitioners Phillip Amato, Rita Amato, and James Raffa, and co-defendants Ugo Serrone and Michael Scotto, were accused by a Queens County Grand Jury of committing the crimes of Burglary in the First and Third

Degrees, and Arson in the Third Degree. In addition, Petitioner Phillip Amato and co-defendants Serrano and Scotto were charged in the same accusatory instrument of committing the crime of criminal solicitation.

Pretrial, Petitioner Phillip Amato moved to suppress statements on the ground that they were obtained in violation of his State constitutional right to counsel (see People v. Skinner, 52 N.Y.2d 24, 436 N.Y.S.2d 207, 417 N.E.2d 501 [Ct.App. 1981]). A hearing was conducted at which Petitioner Phillip Amato's retained trial counsel testified to establish that the statements sought to be suppressed were obtained by an informant after Petitioner's right to counsel under the New York State Constitution had indelibly attached, viz: the date and time when he informed law enforcement officials that he represented Petitioner such that no

statements could be elicited from Petitioner without counsel's presence. The court, finding that Petitioner's right to counsel was violated, ordered suppression. The court also ordered that retained counsel, and his law firm, were disqualified from further representing Petitioner Phillip Amato, thereby requiring Petitioner to retain new counsel shortly before trial.

After pretrial motions were decided, Petitioners proceeded to trial before Hon. William D. Friedmann, and a jury. However, co-defendants Serrone and Scotto waived their rights to a jury trial. Petitioners moved to sever their joint trial from the non-jury joint trial of co-defendant Serrone and Scotto. The motion to sever was denied and the court conducted a single jury/non-jury trial.

The State's case against Petitioners and co-defendants Serrone and Scotto wa

entirely circumstantial, the most damning of which came from Joseph Minchella (a resident of the community and friend of Petitioners and the co-defendants), whose role in this case was sufficiently ambiguous that his status as an accomplice was submitted to the jury as a question of fact.[1]

Also relied on by the State was testimony from the owner of the fired premises (Mrs. Surinder Arora) concerning, inter alia, the community's widespread opposition to the sale or renting of her

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[1] In New York, a conviction may not rest on the uncorroborated testimony of an accomplice (N.Y. Crim. Pro. L. §60.22 [McKinneys 1981]). Subdivision 2 of section 60.22 defines an accomplice as:

> "a witness in a criminal action who, according to the evidence adduced in such action, may reasonably be considered to have participated in:
>
> (a) The offense charged; or
>
> (b) An offense based upon the same or some of the same facts or conduct which constitute the offense charged."

house to New York City for use as a residential foster care facility for infants ranging in age from birth to two years, and several alleged incidents between her and members of the community, including Petitioners Phillip Amato, Rita Amato, and James Raffa, and co-defendant Michael Scotto, some of which she reported to the police. To rebut Mrs. Arora's testimony, the defense subpoenaed the commander of the police precinct embracing the neighborhood in which these incidents allegedly occurred, as well as the police reports reflecting the reported incidents and the precinct's books and records for the period covering these incidents.

Though police documents were provided to the defense, the court declined to enforce the subpoena requiring the attendance and testimony of the Precinct Commander, which the defense expected would be that, after a diligent search of the

records was conducted, no reports reflecting the incidents Mrs. Arora allegedly complained about were found. Rather, the court would only permit the defense to cross-examine Mrs. Arora concerning the absence of the reports.

After hearing evidence from both the State and the defense, including testimony from Petitioner Raffa, the jury deliberated for two days ultimately finding Petitioners guilty of burglary in the first degree and arson in the third degree, but not guilty of burglary in the third degree. However, prior to the commencement of jury deliberations, Justice Friedmann dictated into the record his decision dismissing the counts of the indictment charging Petitioners and co-defendants Serrone and

Scotto with burglary in the first and third degrees.[2]

REASONS FOR GRANTING THE WRIT

SUBSTANTIAL ISSUES AFFECTING THE FAIR ADMINISTRATION OF CRIMINAL JUSTICE ARE PRESENTED CONCERNING THE CONDUCT OF JURY/NON-JURY TRIALS IN THE CONTEXT OF A SINGLE CRIMINAL TRIAL, THE RIGHT OF AN ACCUSED TO BE REPRESENTED BY COUNSEL OF CHOICE, AND THE RIGHT TO PRESENT A DEFENSE.

This Petition presents substantial issues affecting the fair administration of criminal justice concerning the conduct of jury/non-jury trials, the right to counsel of choice, and the right to present a defense (see, Rakas v. Illinois, 439 U.S. 128, 130 [1978], reh. denied, 439 U.S. 1122 [1979]). The issues presented are "beyond the academic or episodic" (Rice v. Sioux

---

[2] The state's appeal of the order dismissing burglary in the first degree was ultimately dismissed by the Appellate Division, on the State's consent.

City Cemetery, 349 U.S. 70, 74 [1955]), and are important "to the public as distinguished from" being important to the "particular parties" involved (Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 [1923]; Rice v. Sioux City Cemetery, supra, 349 U.S. at p. 79). Accordingly, certiorari to review the Decisions and Orders of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, affirming Petitioners' convictions of arson in the third degree, should in all respects be granted.

A. The Joint Jury/Non-Jury Trial.

At the Appellate Division, as they did during their trial, Petitioners argued, inter alia, that their federally guaranteed rights to a fair trial, confrontation and cross-examination, were violated by the procedure adopted by the court for

conducting the combined jury/non-jury trial in their case. The Appellate Division rejected these claims, finding that "under the circumstances of this case, the trial court exercised its discretion within permissible legal limits when it ordered a joint bench and jury trial, and that the procedure did not prejudice the defense" (3a).

Prior to trial, the court denied Petitioners' application for a severance of the "jury/non-jury defendants" and issued an outline of the procedures to be followed in the examination and cross-examination of the State's witnesses. According to the outline, after the State finished its direct examination, counsel for Petitioners (the jury defendants) were permitted to cross-examine in the jury's presence concerning their respective clients. Upon completion of cross-examination by Petitioners, the non-jury defendants were

permitted to cross-examine the State's witnesses in the jury's absence. The same procedures were to be followed with redirect and recross. However, unlike the jury, Justice Friedmann, who was also sitting as a trier of fact, had the benefit of all the direct and all the cross-examination of the State's witnesses.

As the trial progressed, counsel for both the jury and non-jury defendants recognized the inequities in the court's procedure. For example, counsel protested that Petitioners (the jury defendants) did not have the same benefits of cross-examination as did the non-jury defendants. Counsel for Petitioners argued that the jury was hearing direct testimony concerning the non-jury defendants, who were charged acting in concert with Petitioners, that was not tested during cross-examination. Yet the court, as the trier of fact for the non-jury defendants,

had the benefit of the entire direct and entire cross-examination. The court responded "I don't care. I will have to give constant instructions to the fact that they are to disregard anything unless it has to do with acting in con[cert]" (T616-17; emphasis added).

Petitioners' concerns that they were prejudiced by the court's procedure turned out to be well-founded. Not only did the jury miss cross-examination which brought out inconsistencies in the testimony of the complainant, the fire marshal who responded to the scene of the fire to conduct an investigation shortly after it was extinguished and then several days later, and the confidential informant (Joseph Minchella), who was cooperating with the Prosecutor's Office to avoid prosecution, but the court's promise that counsel for Petitioners could recross those witnesses became illusory when the promise was

conditioned upon redirect first being conducted by the Assistant Prosecutor.

With specific regard to Joseph Minchella, the Petitioners requested that the non-jury defendants cross-examine first, or that the jury hear the non-jury defendants' cross-examination of him. The requests were made because of Minchella's importance to the State's case. Not only were these applications denied, thereby requiring the Petitioners to cross-examine first, but their right to re-cross was short-circuited when the Assistant Prosecutor announced, "there is going to be no redirect, Your Honor" (T1688-89).

In California v. Green, 399 U.S. 149, 158 (1970), this Court explained that the Confrontation Clause of the Sixth Amendment,

> "(1) insures that the witness will give his statements under oath -- thus impressing him with the seriousness of the matter and guarding against the

> lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness making his statement, thus aiding the jury in assessing his credibility."

With few exceptions (see, e.g., Bruton v. United States, 391 U.S. 123 [1968]), the law has preferred joint trials rather than severance of defendants because joint trials promote judicial economy and efficiency in the administration of criminal justice (see Richardson v. Marsh, 481 U.S. 200, 210 [1987]; People v. Mahboubian, 74 N.Y.2d 174, 183, 544 N.Y.S.2d 769, 773, 543 N.E.2d 34 [Ct.Ap. 1989]). To this end, the law has generally recognized the propriety of multiple juries at the joint criminal trial of multiple defendants and the propriety of jury/non-jury trials in the context of a single

criminal trial (see United States v. LeBron-Gonzalez, 816 F.2d 823 [1st Cir. 1987]; Smith v. DeRobertis, 758 F.2d 1151, 1152 [7th Cir. 1985] [citing cases]; United States v. Lewis, 716 F.2d 16 (D.C.Cir. 1983], cert. denied, 464 U.S. 996 [1983]; United States v. Gonzalez, 610 F.Supp. 568 [D.Puerto Rico 1985]; People v. Ricardo B., 73 N.Y.2d 228, 538 N.Y.S.2d 796, 535 N.E.2d 1336 [Ct.App. 1989]; People v. Wallace, 153 A.D.2d 59, 549 N.Y.S.2d 515 (A.D. 2d Dept. 1989], app. denied, 75 N.Y.2d 925, 555 N.Y.S.2d 44, 554 N.E.2d 81 [Ct.App. 1990]). Viewed as a "partial form of severance" (People v. Ricardo B., supra, 73 N.Y.2d at p. 233, 538 N.Y.S.2d at p. 798), multiple juries are most frequently utilized in cases where Bruton-type problems would otherwise require severance (see United States v. Gonzalez, supra 610 F.Supp. 568).

Unquestionably, multiple juries, including the use of a jury/non-jury

procedure, is an innovative answer to the problems of court congestion and scarcity of judicial resources. In Smith v. DiRobertis, supra, 758 F.2d at p. 1152, the Seventh Circuit said,

> "[a]lthough the double-jury is an innovation with nothing more to recommend it than a saving in trial time, judicial economy is not a trivial goal in this era of massive caseloads; and the Supreme Court *** has shown that it is receptive to innovations designed to reduce the high costs of jury trials. ***
>
> Of course, if the particular innovation increased the risk of convicting the innocent, this would be a high price to pay for some modest savings in the costs of trials."

The growing concern over the ability of the judiciary to cope with burgeoning criminal dockets will inevitably lead to the more frequent use of multiple juries or jury/non-jury trials. However, as noted by the Second Circuit in an analogous context, "there are limits to the risks" a defendant must endure "in order to secure the public

benefits of savings in costs, time and judicial resources and of reduced burdens on disinterested witnesses" (United States v. Figueroa, 618 F.2d 934, 944 [2d Cir. 1980]).

In the case at bar, Petitioners were denied the same benefits of cross-examination accorded to their non-jury co-defendants, in that information was brought to the attention of Justice Friedmann in his capacity as the non-jury trier of facts which was not brought to the jury's attention, notwithstanding that the non-jury co-defendants were charged acting in concert with Petitioners. Moreover, the jury, unlike Justice Friedmann, had an abbreviated opportunity to observe the demeanor of the witnesses during their testimony (see Mattox v. United States, 156 U.S. 237, 242-43 [1895]; California v. Green, supra, 399 U.S. at p. 158).

Certiorari should be granted to review the procedures employed in this case and to set guidelines for future jury/non-jury and multiple jury trials to ensure against the dilution of the accused's fundamental rights to a fair trial and to his rights of confrontation and cross-examination.

B. Petitioner Phillip Amato's Right To Counsel of Choice.

In Wheat v. United States, 486 U.S. 153, 159 (1988), this Court recognized that the right to select and be represented by one's preferred attorney is a component of the Sixth Amendment right to counsel. However, that right is subject to limitations (Id.; United States v. Monsanto, 491 U.S. 600 [1989]; Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 [1989]).

One such limitation in New York is the so-called "advocate-witness" rule embodied in Disciplinary Rules 5-101(B) and 5-102 of

the Code of Professional Responsibility. As interpreted by the New York Court of Appeals, the rule "generally requires the lawyer to withdraw from employment when it appears that he or a member of his firm will be called to testify regarding a disputed issue of fact ***. Thus, once representation is undertaken, the lawyer must withdraw as advocate if it appears that he must testify on behalf of his own client *** or if it appears that he will be called as a witness to testify for the adverse party, where his testimony may be prejudicial to the client he is representing" (People v. Paperno, 54 N.Y.2d 294, 299-300 445 N.Y.S.2d 119, 122, 429 N.E.2d 797 [Ct. App. 1981]).

In this regard, the Court of Appeals recognizing the fundamental nature of the right to counsel of choice said that,

> "[t]he Code of Professional Responsibility establishes ethical standards that guide

> attorneys in their professional conduct, and its importance is not to be dismissed or denigrated by indifference ***. When raised in litigation, however -- which in addition to matters of professional conduct directly involves the interests of clients and others -- the Code provisions cannot be applied as if they were controlling statutory or decisional law" (S & S Hotel v. 777 S.H. Corp., 69 N.Y.2d 437, 443, 515 N.Y.S.2d 735, 738, 508 N.E.2d 647 [Ct.App. 1987]; emphasis added).

In this case, the trial court disqualified Petitioner Phillip Amato's retained counsel, and his firm, from representing him at trial, essentially because counsel testified at a pre-trial hearing in support of Petitioner's motion to suppress statements. The court explained that

> "[trial counsel] could become a witness at trial even though the statements *** were suppressed, should Phillip Amato testify at the trial, as those statements could then be used to impeach Phillip Amato's testimony, and thus the voluntariness of the statements

pursuant to CPL §60.45 would be at issue."

The court's concern was entirely misplaced because, under New York law, the question of voluntariness did not include the concerns mentioned by the court (see People v. Bing, 76 N.Y.2d 331, 337, 346-48, 351, 358, 361, 559 N.Y.S.2d 474, 476-77, 482-484, 485-86, 490, 492, 558 N.E.2d 1011 [Ct.App. 1990]). Consequently, trial counsel simply could not have been a witness had Petitioner elected to testify.

As it turned out, Petitioner Phillip Amato not only did not testify on his own behalf but, when called as a witness by his wife, Petitioner Rita Amato, he exercised his privilege against self-incrimination and refused to testify on her behalf. Even before trial, the court was well-aware that Petitioner Phillip Amato was not going to testify because, in conjunction with her motion to sever, Petitioner Rita Amato

submitted a supporting affidavit in which she alleged that her husband "does not intend to testify on his own behalf at a joint trial [and] has further advised me that should I call him as a witness in my behalf, he will not voluntarily testify and waive any of his rights under the Fifth Amendment to the U.S. Constitution."

A second justification for disqualification came after trial -- a justification which was unknown to the court when trial counsel and his firm were disqualified and, indeed was not even identified by the court as a reason in its Memorandum Decision. The justification, found to be persuasive by the Appellate Division, was that Petitioner Phillip Amato's substitute counsel called as a witness former counsel's law partner. A review of that defense witness' testimony, however, reveals that it was confined to reciting historical facts which were

undisputed, viz: that his and trial counsel's firm had represented an organization, of which Petitioners were members, in its legal efforts to block New York City from opening a foster care facility in their neighborhood. Though the testimony was background to explain the context in which the arson was allgedly committed, the testimony bore no relevance to the question of Petitioners' guilt or innocence. In short, when trial counsel and his firm were disqualified from further representation, the court had no reason to believe that a member of trial counsel's firm would be called as a witness.

Since the Court's 1988 ruling in Wheat v. United States, supra, motions to disqualify defense counsel have been made, and granted, with greater frequency (see Frost, "Lawyers Disqualified in Gotti Prosecution. Conflicts, Advocate-Witness Rules Cited," New York Law Journal,

7/29/91, p. 1). Indeed, the "advocate-witness" rule was relied upon as a basis for disqualifying counsel in a notorious case on the government's motion (see, United States v. John Gotti, et al., ____ F.Supp. ____ [E.D.N.Y. 1991] [New York Law Journal, 8/5/91, p. 21]). Certiorari should be granted to review the circumstances under which the "advocate-witness" rule may be successfully invoked as a limitation on a criminal defendant's right to counsel of choice.

C. Petitioner's Right To Compulsory Process.

As part of their defense, Petitioners subpoenaed the Commander of the Police Precinct at which the complainant testified she filed complaints against several members of the Gladwin Avenue community. The purpose of her testimony was to establish that there was animosity against her and her family antedating the fire at

her house. That animosity, according to the prosecution, provided a motive for the arson.

To rebut her testimony on this issue, and to establish her bias against them, Petitioners sought the testimony of the precinct commander which they expected would be that the complainant did not file those complaints. The court declined to enforce the subpoena requiring the precinct commander's attendance, and instead instructed Petitioners that were to rely on cross-examination of the complainant using police documents, furnished pursuant to subpoena, showing that the complaints were not filed.

Recognizing the wide discretion afforded trial courts concerning the admission of evidence, this Court in Crane v. Kentucky, 476 U.S. 683, 690 (1986) said that

> "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment *** or in the Compulsory Process or Confrontation clauses of the Sixth Amendment *** the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"

In United States v. Abel, 469 U.S. 45, 52 (1984), this Court unequivocally recognized the importance of evidence of a witness' bias, noting that, "[t]he 'common law of evidence' allowed the showing of bias by extrinsic evidence, while requiring the cross-examiner to 'take the answer of the witness' with respect to less favored forms of impeachment."

In the case at bar, Petitioners were denied their federally guaranteed rights to present a complete defense and compulsory process, being relegated "to less favored forms of impeachment" (Id.), to establish the complainant's bias against them.

Certiorari should be granted to review whether Petitioners' federally guaranteed rights to fairness in presenting their defense were violated by the trial court's seemingly arbitrary refusal to enforce a subpoena against a potential significant defense witness.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
November 19, 1991

Respectfully submitted,

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APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

DECISION & ORDER
Argued - December 17, 1990

_____AD2d_____

LAWRENCE J. BRACKEN, J.P.
SYBIL HART KOOPER
THOMAS R. SULLIVAN
CORNELIUS J. O'BRIEN, JJ.

1887E

The People, etc., respondent,
v Phillip Amato, appellant.
(Ind. No. 3047/87)

Richard E. Mischel, P.C., New York, N.Y., for appellant
John J. Santucci, District Attorney, Kew Gardens, N.Y. (John Castellano of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Friedmann, J.), rendered September 9, 1988, convicting him of arson in the third degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed, and the matter is remitted to the Supreme Court, Queens County, for further proceedings pursuant to CPL 460.50(5).

Contrary to the defendant's contention, we find that his guilt of arson in the third degree was established beyond a reasonable doubt. The evidence adduced at trial established that on the night of April 20, 1987, a fire broke out at 171-27 Gladwin Avenue, Queens, a private one-family residence which had recently been leased by its owner to the City of New York for the purpose of housing foster children. The defendants Phillip and Rita Amato and James Raffa owned homes on Gladwin Avenue, and were active in neighborhood associations formed to oppose the city's plans. To this end they succeeded in obtaining a temporary restraining order enjoining the city from occupying the house, but had also, on several occasions prior to the actual fire, threatened to burn the house down.

The evidence further showed that on the night of the fire, as the codefendant Rita Amato gathered with her codefendants and other neighbors on the lawn across from the subject premises, she helped to lure the city's security guard from the home, told an uninvolved neighbor to stay inside his home, and then telephoned a television news station to tell them the house might be burned down. The defendant Phillip Amato, after directing Michael Scotto and another neighbor to act as lookouts, joined with the codefendant James Raffa, who was concealing a bottle of clear liquid under his jacket, and the codefendant Ugo Serrone, and walked into the rear yard of the property adjoining the subject house. The sound of glass breaking was heard shortly thereafter, and the house was soon filled with smoke and flames. As the building was blazing, the defendants stood watching from across the street, some toasting the fire with glasses of liquor. An investigation revealed that the fire was intentionally set by use of a flammable liquid.

Viewing this circumstantial evidence in the light most favorable to the People (*see, People v Contes*, 60 NY2d 620), we conclude that the facts from which the jury could infer the defendant's guilt were inconsistent with his innocence and

excluded to a moral certainty every other reasonable hypothesis but guilt (*see, People v Betancourt*, 68 NY2d 707; *People v Giuliano*, 65 NY2d 766). Moreover, upon the exercise of our factual review power, we are satisfied that the verdict was not against the weight of the evidence (*see*, CPL 470,.15[5]).

The codefendants Michael Scotto and Ugo Serrone waived their right to a jury trial and the remaining defendants moved for severance. Contrary to the defendant's contention on appeal, we do not find that the court's denial of his motion for a severance was an improvident exercise of discretion, or that the joint trial violated his rights under the Confrontation Clause. The evidence against all five defendants, who were charged with acting in concert, was essentially identical, and the defendant failed to proffer the requisite "cogent reasons" (*People v Bornholdt*, 33 NY2d 75, 87, *cert denied sub nom. Victory v New York*, 416 US 905) to warrant separate trials (*see, People v Mahboubian*, 74 NY2d 174, 183). Moreover, we find that under the circumstances of this case, the trial court exercised its discretion within permissible legal limits when it ordered a joint bench and jury trial, and that the procedure did not prejudice the defense (*see, People v Wallace*, 153 AD2d 59; *see also, People v Ricardo B.*, 73 NY2d 228).

The defendant also contends that the court violated his constitutional right to counsel of his own choice when it disqualified the law firm he had originally retained, after a member of that firm testified at a pretrial hearing. We disagree.

The right to counsel of one's own choosing is not absolute but may be overridden where necessary (*see, S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437; *People v Arroyave*, 49 NY2d 264). One restriction on the right is the so-called "advocate-witness rules". This rule is embodied in the provision of Code of Professional Responsibility, DR 5-101(B) and 5-102, and generally requires counsel to withdraw

from employment when it appears that he or a member of his firm will be called as a witness to testify regarding a disputed issue of fact (*see, e.g., United States v DeFazio*, 899 F2d 626; *United States v Cunningham*, 672 F2d 1064, *cert denied* 466 US 951).

In this case, the defendant claims that a member of the law firm which he retained to defend him at trial had contacted investigators and had advised them of his representation of the defendant, and that these investigators nevertheless continued to question the defendant. The attorney in question testified at the pretrial hearing on this issue. Although the court granted the defendant's motion to suppress to the extent that it was premised on this argument, the People indicated an intent to use the illegally obtained statement in order to impeach the defendant should he testify at trial.

Under these circumstances, the trial court was understandably concerned with the prospect that the propriety of the defendant's incriminating statements might still surface as an issue at trial, leading to the possibility that the defendant's trial counsel would have to testify. The propriety of the trial court's ruling was later borne out when a member of the law firm in question in fact testified at the trial. Under these circumstances, we conclude that the trial court did not err or improvidently exercise its discretion in disqualifying the defendant's attorney.

We have examined the defendant's remaining contentions and find them to be without merit.

BRACKEN, J.P., KOOPER, SULLIVAN and O'BRIEN, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

DECISION & ORDER
Argued - December 17, 1990

_____AD2d_____

LAWRENCE J. BRACKEN, J.P.
SYBIL HART KOOPER
THOMAS R. SULLIVAN
CORNELIUS J. O'BRIEN, JJ.

1888E

The People, etc., respondent,
v Rita Amato, appellant.
(Ind. No. 3047/87)

Schapiro and Reich, Lindenhurst, N.Y. (Perry S. Reich of counsel), for appellant.

John J. Santucci, District Attorney, Kew Gardens, N.Y. (John Castellano of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Friedmann, J.), rendered September 9, 1988, convicting her of arson in the third degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed, and the matter is remitted to the Supreme Court, Queens County, for further proceedings pursuant to CPL 460.50(5).

We have considered and rejected most of the contentions raised by the defendant upon the appeal by her codefendant Phillip Amato, with whom this defendant was jointly tried (*see, People v Amato,* ____AD2d____[decided herewith]). The defendant has not raised any arguments requiring a different result.

BRACKEN, J.P., KOOPER, SULLIVAN and O'BRIEN, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

DECISION & ORDER
Argued - December 17, 1990

_____AD2d_____

LAWRENCE J. BRACKEN, J.P.
SYBIL HART KOOPER
THOMAS R. SULLIVAN
CORNELIUS J. O'BRIEN, JJ.

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The People, etc., respondent,
v James Raffa, appellant.
(Ind. No. 3047/87)

Eugene B. Nathanson, Brooklyn, N.Y., for appellant.

John J. Santucci, District Attorney, Kew Gardens, N.Y. (John Castellano of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Friedmann, J.), rendered September 9, 1988, convicting him of arson in the third degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed, and the matter is remitted to the Supreme Court, Queens County, for further proceedings pursuant to CPL 460.50(5).

We have considered and rejected most of the contentions raised by the defendant upon the appeal by his codefendant Phillip Amato, with whom this defendant was jointly tried (*see, People v Amato*, ____AD2d____[decided herewith]). The defendant has not raised any arguments requiring a different result.

In addition, we note that we agree with the defendant that the court erred in precluding him from questioning Fire Marshal John Carney regarding a prior inconsistent statement made to him by Joseph Minchella, which, at trial, Minchella denied making (*see*, Richardson, Evidence, §§ 501, 502 [Prince 10th ed]). However, in light of the overwhelming evidence of the defendant's guilt adduced at the trial, the error was harmless (*see, People v Crimmins*, 36 NY2d 230).

BRACKEN, J.P., KOOPER, SULLIVAN and O'BRIEN, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

STATE OF NEW YORK
COURT OF APPEALS

CERTIFICATE DENYING LEAVE UPON RECONSIDERATION

BEFORE: HON. VITO J. TITONE Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

PHILLIP AMATO,

Appellant.

I, VITO J. TITONE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Staten Island, New York
August 21, 1991

Associate Judge

Order of Appellate Division, Second Department dated May 28, 1991, affirming a judgment of Supreme Court, Queens County rendered September 9, 1988.

*Description of Order

STATE OF NEW YORK
COURT OF APPEALS

CERTIFICATE DENYING LEAVE UPON RECONSIDERATION

BEFORE: HON. VITO J. TITONE Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

RITA AMATO,

Appellant.

I, VITO J. TITONE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Staten Island, New York
August 21, 1991

Associate Judge

Order of Appellate Division, Second Department dated May 28, 1991, affirming a judgment of Supreme Court, Queens County rendered September 9, 1988.

*Description of Order

STATE OF NEW YORK
COURT OF APPEALS

CERTIFICATE DENYING LEAVE UPON RECONSIDERATION

BEFORE: HON. VITO J. TITONE Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

JAMES RAFFA,

Appellant.

I, VITO J. TITONE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Staten Island, New York
August 21, 1991

Associate Judge

Order of Appellate Division, Second Department dated May 28, 1991, affirming a judgment of Supreme Court, Queens County rendered September 9, 1988.

*Description of Order